

DATE: October 31, 2005

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In Re:

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SSN: -----

Applicant for Security Clearance

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ISCR Case No. 03-08588

## DECISION OF ADMINISTRATIVE JUDGE

**ARTHUR E. MARSHALL, JR.**

### APPEARANCES

#### FOR GOVERNMENT

Rita O'Brien, Esq., Department Counsel

#### FOR APPLICANT

Leslie S. McAdoo, Esq.

### SYNOPSIS

Applicant is a 34-year-old married male who has worked for a defense contractor since April 2002. He is a naturalized United States citizen possessing limited English language proficiency. Applicant was arrested in 1990 for Driving While Intoxicated (DWI). In 1993, 1999, and 2004, he was arrested for, and convicted of, similar offenses, and received appropriate counseling. On his 2002 security clearance application, two of his answers regarding alcohol usage were incomplete or incorrect. Applicant has successfully shown that the incorrect answers on his security application were the result of English language difficulties, but he has failed to mitigate security concerns regarding his use of alcohol. Clearance is denied.

### STATEMENT OF THE CASE

On October 15, 2004, the Defense Office of Hearings and Appeals (DOHA), pursuant to Executive Order 10865, *Safeguarding Classified Information Within Industry*, dated February 20, 1960, as amended and modified, and Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (Directive), dated January 2, 1992, as amended and modified, issued a Statement of Reasons (SOR). That SOR detailed why, pursuant to Guideline G (Alcohol Consumption) and Guideline E (Personal Conduct), DOHA could not make the preliminary affirmative finding under the Directive that it is clearly consistent with the national interest to grant or continue a security clearance for Applicant. By letter of November 3, 2004, Applicant responded to the SOR. He admitted to four allegations, constructively admitted to one allegation, and provided two explanatory non-answers to the seven allegations noted under Guideline G (Alcohol Consumption), and he offered explanatory responses to the two allegations set forth under Guideline E (Personal Conduct).

I was assigned this case on May 25, 2005. On June 9, 2005, as an accommodation to Applicant's original counsel's schedule, a hearing was set for July 25, 2005. Subsequently, owing to a change of that counsel and a request for delayed proceedings, an August 1, 2005, Amended Notice of Hearing was issued, setting the hearing for September 27, 2005. At the hearing, Applicant used an interpreter, introduced 16 exhibits, and presented three witnesses; the Government introduced seven exhibits<sup>(1)</sup> and presented no witnesses. At the hearing, the Government added one additional

allegation under Guideline G, which Applicant admitted.<sup>(2)</sup>

The record was kept open through October 24, 2005, to permit Applicant to supplement the record with a 17<sup>th</sup> exhibit, accepted into the record as Applicant Exhibit Q. I received the transcript on October 7, 2005.

## FINDINGS OF FACT

Applicant has admitted six of the 10 allegations set forth under Guidelines G and E, as amended. After a complete and thorough review of the evidence in the record, I make the following additional findings of fact:

Applicant is a 34-year-old male who has worked for the same defense contractor since April 2002. He was born in El Salvador and English is his second language. He immigrated to the United States at the age of 14, where he continued his education in an American public school to the 11<sup>th</sup> grade level. During this time he took classes in English as a Second Language along with his mainstream studies. He is now a naturalized United States citizen. Applicant is married to a fellow émigré from El Salvador who speaks little English, and the couple has two very young sons.

Although he started his current employment at the entry-level, Applicant has since been promoted. He is now a supervisor for housekeeping and for the escorting of personnel. He has received multiple Certificates of Appreciation for his job performance. Moreover, his references praise his work, note his dogged determination, professionalism, and flexibility, and emphasize his value as an effective and polite team player. Although his English language skills are limited and sometimes stretched at work, he has the aid of his superiors and peers to compensate for this problem when he feels that help is needed.<sup>(3)</sup> Applicant also holds a second job, thus limiting his scant free time to weekends.

At the age of 18, Applicant began drinking alcoholic beverages; beer is his drink of choice. When he drinks, it is usually at home on weekends. Although it has not impacted his on-the-job work performance, his wife, who does not drink alcohol, does not approve of excessive drinking.

Applicant was first arrested for Driving While Intoxicated (DWI) on December 22, 1990. A bench warrant was issued, but he was not served with it. That charge was ultimately dismissed.<sup>(4)</sup>

On April 12, 1993, Applicant was again arrested for DWI after leaving a restaurant. He was also charged with Failing To Use Turn Signals and for Weaving on the Road. Eventually, he was found guilty, sentenced to two years probation, ordered to receive six months of counseling, required to attend two Alcoholics Anonymous (AA) meetings per week for six months, and his driver's license was suspended for 30 days.<sup>(5)</sup> He was also required to participate in a pre-release program as an alternative to incarceration. That program necessitated his visiting a Pre- Release Center three days a week for alcohol and drug testing. Applicant successfully completed the court's requirements, then resumed his consumption of alcoholic beverages.

Six years later, on December 11, 1999, Applicant rear-ended another driver's car after he had been drinking at a holiday party hosted by his supervisor. Not noticing any damage, he left the scene of the accident before the appropriate authorities could be contacted. He was located by police later that night. Smelling strongly of liquor and admitting to having consumed six beers, he was arrested.. Applicant ultimately was convicted of Driving Under the Influence, Failure to Obey Designated Lane Directions, and Failure to Notify (the appropriate motor vehicle registry) of Address Change.<sup>(6)</sup> Applicant was given one year of probation and fined \$1,000.00.<sup>(7)</sup> Consequentially, Applicant voluntarily attended a substance abuse treatment program from December 11, 1999, to July 11, 2000. He was also advised to attend AA. He declined to attend AA and returned to drinking after he had completed his court-ordered requirements and his counseling.<sup>(8)</sup>

Two months after starting his current job, Applicant was asked to complete an application for security clearance (SF 86). Although he did not entirely understand the full significance of either the clearance process or the form, Applicant answered the questions to the best of his ability despite his linguistic limitations and without soliciting any language assistance. This resulted in his turning in the application to his superiors in an incomplete form at least twice. In turn, his superiors returned the application to him for completion - without comment or inquiry as to why he had failed to

complete the application. The SF 86 was eventually finished and signed on June 11, 2002.

With regard to Question 24 (**Your Police Record - Alcohol/Drug Offenses.** *Have you ever been charged with or convicted of any offense(s) related to alcohol or drugs?*), Applicant answered "Yes," but only noted his December 12, 1999, DWI offense. He only listed the one incident because "that was the recent one, you know. I didn't know if they were asking, you know, how many times."<sup>(9)</sup> As to Question 30 (**Your Use of Alcohol.** *In the last 7 years, has your use of alcoholic beverages (such as liquor, beer, wine) resulted in any alcohol-related treatment or counseling (such as for alcohol abuse or alcoholism?)*), Applicant answered "No." Applicant did not list his 1999 treatment program because he felt that his enrollment was the result of his own conscious, volitional decision to seek help, not the result of a particular alcohol-related incident or court order.<sup>(10)</sup>

To bolster his case against the allegations under Guideline E, Applicant introduced a college professor for consideration as an expert witness. The professor has an extensive background in linguistics and language learning, specializes in Spanish syntax and adult language acquisition, and has appeared before other tribunals as an expert witness on similar linguistic issues. In the absence of objection from the Government, the witness was qualified as an expert owing to his education, skill, experience, and knowledge. The expert determined, based on an oral proficiency interview and various proficiency tests, that Applicant possesses a limited working proficiency of the English language.<sup>(11)</sup> Additionally, he theorized as to how the two disputed SF 86 answers were the product of Applicant's poor English language skills

On July 10, 2004, Applicant visited a theme park with his family. After the park, the family went to his sister's home, where a party ensued. Wanting to contribute to the party, he left to buy more beer.<sup>(12)</sup>

During that drive, Applicant again was arrested on alcohol-related charges. On April 21, 2005, he was found guilty of (Driving/Attempting To Drive) Under The Influence and of Unsafe Lane Changing. At his April 21, 2005, sentencing, he received a two year sentence with all but one month suspended, two years probation, and given fines and costs. Again he received counseling and attended AA. Applicant has not consumed alcohol since this arrest because "(a)fter that last arrest I realize, you know, that it is not worth it... I had a family and I didn't want to give them that kind of life, you know. I wanted to provide for them .... So I decided to stop drinking at all..."<sup>(13)</sup> This is Applicant's first genuine attempt to permanently quit drinking, as opposed to former resolutions to moderate his drinking. Prior attempts at sobriety were different in that they were consciously limited in duration to the length of his counseling, probation, or court-ordered requirements.

## POLICIES

Enclosure 2 of the Directive sets forth adjudicative guidelines which must be considered in the evaluation of security suitability. In addition to brief introductory explanations for each guideline, these adjudicative guidelines are subdivided into those that may be considered in deciding whether to deny or revoke one's eligibility for access to classified information (Disqualifying Conditions) and those that may be considered in deciding whether to determine one could still be eligible for access to classified information (Mitigating Conditions).

In application, an Administrative Judge is not strictly bound to the adjudicative guidelines. As guidelines, they are but part of an amalgam of elements for the Administrative Judge to consider in assessing an applicant in light of the circumstances giving rise to the SOR, as well as in assessing the applicant as a whole. The concept of the "whole person" means that all available, reliable information about the person - whether it is good or bad, present or past - should be considered in making a fair, impartial, and meaningful decision as to his or her suitability to hold a security clearance. To that end, Enclosure 2 also sets forth factors to be considered during this part of the adjudicative process, including: (1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individuals age and maturity at the time of the conduct; (5) the voluntariness of participation; (6) the presence or absence of rehabilitation and other pertinent behavioral changes; (7) the motivation of the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence.

After a full and thorough examination, however, the final assessment must comport with the considerable gravity of the

<sup>(14)</sup>

final decision. There is no right to a security clearance

and one seeking access to classified information must be prepared to enter into a fiduciary relationship with the United States Government that is inherently predicated on trust and confidence. Therefore, when the facts proven by the Government raise doubts as to an applicant's judgment, reliability, or trustworthiness, the applicant has the heavy burden of persuasion to demonstrate that he or she is nonetheless security worthy. As noted by the United States Supreme Court, "the clearly consistent standard indicates that security clearance determinations should err, if they must, on the side of denials."<sup>(15)</sup> Therefore, any doubts will be resolved in favor of the national security, not the Applicant.

Finally, it should be noted that Applicant's allegiance, loyalty, and patriotism are not at issue in these proceedings. Section 7 of Executive Order 10865 specifically provides that industrial security clearance decisions shall be "in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." Therefore, nothing in this Decision should be construed to suggest I have based this decision, in whole or in part, on any express or implied determination as to Applicant's allegiance, loyalty, or patriotism.

Based upon a consideration of the evidence as a whole, I find the following adjudicative guideline most pertinent to an evaluation of the facts of this case:

**Guideline G - Alcohol Consumption. *The concern. Excessive alcohol consumption often leads to the exercise of questionable judgment, unreliability, failure to control impulses, and increases the risk of unauthorized disclosure of classified information due to carelessness.***<sup>(16)</sup>

**Guideline E - Personal Conduct. *The concern. Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information.***<sup>(17)</sup>

Conditions that could raise a security concern and may be disqualifying, as well as those which could mitigate security concerns pertaining to these adjudicative guidelines, are set forth below.

## CONCLUSIONS

Upon consideration of all the facts in evidence, and after application of all legal precepts, factors, and conditions, including those described briefly above, I find the following with respect to the allegations set forth in the SOR:

With respect to Guideline G (Alcohol Consumption), the Government has established its case. Applicant admits to the allegations contained in the SOR that he was arrested for DWI in 1990 and both arrested and convicted of similar offenses in 1993 and 1999. He also concedes that he was arrested and convicted of (Driving/Attempting To Drive) A Vehicle While Under the Influence in 2004, a conviction for which he is still under probation. Such a history raises a genuine security concern with regard to Alcohol Consumption Disqualifying Condition (AC DC) E2.A7.1.2.1 (*[a]lcohol related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, or other criminal incidents related to alcohol use*). Furthermore, following bouts of heavy drinking and weekend socializing, Applicant has repeatedly made the drunken decision that he could maneuver a motor vehicle undetected, safely, and without incident. Such facts give rise to AC DC E2.A7.1.2.5 (*[h]abitual or binge consumption of alcohol to the point of impaired judgment*).

With disqualifying conditions thus established, the burden shifts to Applicant to mitigate the security concerns raised. He has shown that he has little free time except on the weekend. He has also shown that he regularly drank alcohol at home on the weekends, and that he rarely drank outside the home. Yet on at least four occasions in 14 years, he deviated from his routine, went out to socialize, became intoxicated, chose to drive, drove erratically, got caught, and was arrested for drinking and driving.<sup>(18)</sup> Four instances in 14 years of being caught while "on the town" and driving drunk does help to present a pattern. Therefore, mitigation cannot be found under Alcohol Consumption Mitigating Condition E2.A7.1.3.1 (*[t]he alcohol related incidents do not indicate a pattern*). As well, the last incident occurred as recently as last year, thus obviating the applicability of AC MC E2.A7.1.3.2 (*[t]he problem occurred a number of years ago and there is no indication of a recent problem*).



Moreover, although Applicant received counseling following these incidents, attended AA on a number of occasions, and now has abstained from drinking for over a year, there is no indication that he has received the formal diagnosis and additional support that are required to invoke AC MC E2.A7.1.3.4 (*[f]ollowing diagnosis of alcohol abuse or alcohol dependence, the individual has successfully completed inpatient or outpatient rehabilitation along with aftercare requirements, participates frequently in Alcoholics Anonymous or a similar organization, has abstained from alcohol for a period of at least 12 months, and received a favorable prognosis by a credentialed medical professional or licensed clinical social worker who is a staff member of a recognized alcohol treatment program*).

Additionally, after Applicant was arrested for his most recent alcohol-related driving incident, he decided to quit drinking by going "cold turkey." He implies that past bouts of alcohol-free living were merely intervals he endured in order to comply with probations, complete counseling or treatment programs, and to help pass substance testing; the most he learned from all these hours of support was that he should try to reduce his drinking. This, he argues, is his first attempt to really quit drinking and he has done so for 15 months without any external support. Moreover, Applicant argues that this time is different because he wants to provide a better life for his family and because he does not want to lose his job, <sup>(19)</sup>

considerations which, apparently, had not before seemed important. Based on his testimony at the hearing, his desire to stay alcohol-free seems genuine. This singular positive change, however, does not, by itself, fall within the gamut of complementary methodologies or scenarios available under AC MC E2.A7.1.3.3 (*[p]ositive changes in behavior supportive of sobriety*).

Furthermore, it cannot be ignored that Applicant is still under probation from his last violation. Therefore, it is premature to mitigate the security concerns raised herein under any of the AC MC E2.A7.1.3 considerations and adjudge them as things of the past. This is especially true since he has in the past "quit" for periods of time in order to meet the dictates of the court or counseling. Consequentially, I find that these past 15 months do not represent a true bell-weather indicator of future abstinence or disciplined moderation. Perhaps two or more years of sobriety and some showing of external support might overcome the brevity of this experiment, but, as for now, it is premature to declare success. No other mitigating conditions apply.

With respect to Guideline E (Personal Conduct), the Government cites to Applicant's failure to disclose all of his alcohol-related charges and convictions on Question 24 of the SF 86, and his denial on Question 30 that his use of alcohol ever resulted in any alcohol-related treatment or counseling in the prior seven years, as a basis to raise a Personal Conduct Disqualifying Condition (PC DC). Under these facts, PC DC E2.A5.1.2.2 (*[t]he deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities*) and PC DC E2.A5.1.2.4 (*[p]ersonal conduct or concealment of information that increases an individual's vulnerability to coercion, exploitation or duress, such as engaging in activities which, if known, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail*) seem poised for applicability.

Applicant, however, chose not to directly address any potentially applicable disqualifying condition because: "I don't believe the Department can show that (Applicant) falsified a material fact in his (SF 86) questionnaire."<sup>(20)</sup> Applicant simply argues that his limited English skills led to his failure to fully comprehend the SF 86 questions now at issue. I agree. Although Applicant has a history of seeking help when he feels he has a particular linguistic problem, he did not seek help with these questions. The evidence indicates this was partly because he did not discern a problem with his interpretation of the question, and partly because he did not understand the full importance of the SF 86. Regardless, given the scant English language skills demonstrated at the hearing and his credible testimony as to why he answered as he did, as well as the witness' testimony as to Applicant's tested English language abilities and interpretational skills, I find that Applicant did not knowingly omit, conceal, or falsify the answers at issue. Therefore, I find for Applicant with regard to Guideline E.

I have considered both the record evidence and the Applicant using the "whole person" concept. Applicant is a husband, a father, and a well regarded employee who is entering his prime and serving in a responsible, professional position. His

testimony was credible and he seems most earnest. He seeks to mollify or mitigate important national security concerns, however, simply by explaining that his newest period of abstinence will endure because it is motivated by his wants for his family and his desire to keep his present employment. He does so without explaining why these wants were not of concern in the past, and without acknowledging that - personal wants aside - his drunk driving posed grave risks to himself, to those with whom he shared the road, and to society at large. More troubling, however, is his attempt to quell those security concerns by stating that his current sobriety will endure, while simultaneously noting that he has embraced sobriety in the past merely as a temporary means to successfully complete counseling or treatment and court-ordered requirements. Fifteen months of sobriety, given his past record and his current probation, does not mitigate concerns or demonstrate resolve; it would be premature to now evaluate Applicant's ability to adhere to his stated plan or gauge his potential for success. [\(21\)](#)

Based on the evidence and on Applicant's failure to mitigate the security concerns raised by the Government's case, I find all the allegations set forth in paragraph 1 with regard to Guideline G against the Applicant and in the Government's favor.

### **FORMAL FINDINGS**

Formal findings For or Against Applicant on the allegations set forth in the SOR, as required by Section E3.1.25 of Enclosure 3 of the Directive, are:

#### Paragraph 1, Guideline G: AGAINST THE APPLICANT

Subparagraph 1.a Against the Applicant

Subparagraph 1.b Against the Applicant

Subparagraph 1.c Against the Applicant

Subparagraph 1.d Against the Applicant

Subparagraph 1.e Against the Applicant

Subparagraph 1.f Against the Applicant

Subparagraph 1.g Against the Applicant

Subparagraph 1.h Against the Applicant

#### Paragraph 2, Guideline E: FOR THE APPLICANT

Subparagraph 2.a For the Applicant

Subparagraph 2.b For the Applicant

### **DECISION**

In light of all the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant a security clearance for Applicant. Clearance is denied.

Arthur E. Marshall, Jr.

Administrative Judge

1. These were admitted into evidence as Applicant Exhibit A-P and Government Exhibits 1-7, respectively.

2. "Under Guideline G, ... 1.h, you were arrested by (police) on July 10<sup>th</sup>, 2004, for driving/attempting to drive

- a vehicle while impaired by alcohol.... On April 21<sup>st</sup>, 2005, you pleaded guilty." Transcript of September 27, 2005 (Tr.) at 93-94.
3. Tr. at 49-50.
4. See SOR subparagraph 1.b. Subparagraph 1.c appears to cite to a separate violation, but Applicant showed that it is a continuation and the resolution of the facts pertaining to the incident cited at 1.b. See also Tr. at 54-56.
5. See SOR subparagraph 1.d. Applicant correctly demonstrated that the incident cited in subparagraph 1.e is but a continuation and the resolution of the facts set forth in 1.d, and are not free-standing. See also Tr. at 79-84.
6. Applicant Exhibit N (Traffic System Citation Disposition Sheet, dated June 28, 2000).
7. See SOR subparagraph 1.f.
8. See SOR subparagraph 1.g.
9. Tr. at 67.
10. Tr. at 69.
11. This assessment is consistent with my determination that Applicant's English language skills are limited, as noted above at page 3.
12. Tr. at 75.
13. Tr. at 52-53.
14. <sup>0</sup> *Department of the Navy v. Egan*, 484 U.S. 518, 528 (1988).
15. <sup>0</sup> *Id.* at 531.
16. Directive, Enclosure 2, Attachment 7, Guideline G, ¶ E2.A7.1.1.
17. Directive, Enclosure 2, Attachment 5, Guideline E, ¶ E2.A5.1.1.
18. The record indicates that when he would drink at home and become drunk or "tipsy," he simply did not drive. Tr. at 112.
19. Tr. at 100-103.
20. Tr. at 151.
21. To withhold such judgment now does not suggest any degree of cynicism as to Applicant's present motives.

Given the standards for determining whether an Applicant is security worthy, however, it is wise to be mindful of those two complementary proverbs - "*Le fleuve passé le saint oublié*" ("The danger past, our vows are soon forgotten.") and "*Scampato il pericolo, gabbato il Santo*" ("The danger escaped, the Saint is deceived").